

Exhibit A

Declaration of Martin A. Muckleroy

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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

THEODORUS STROUS, in his capacity as
a shareholder of SCIO DIAMOND
TECHNOLOGY CORP. brings this action
derivatively on behalf of SCIO DIAMOND
TECHNOLOGY CORP., and as a Class
Action on behalf of himself and all other
Adamas shareholders who are similarly
situated

Plaintiff,

v.

BERNARD MCPHEELY, KARL
LEAVERTON, GERALD MCGUIRE,
LEWIS SMOAK, ADAMAS ONE CORP.
and JOHN G. GRDINA

Defendants,

and

SCIO DIAMOND TECHNOLOGY CORP.,

Nominal Defendant.

Case No. 22-cv-00256-JCM-EJY

**DECLARATION OF MARTIN
A. MUCKLERoy, ESQ.**

JURY TRIAL DEMANDED

DECLARATION OF MARTIN A. MUCKLERoy, ESQ.

1 I, Martin A. Muckleroy, declare as follows:

2 1. I am a partner with Muckleroy Lunt LLC, counsel on behalf of Plaintiffs, and have
3 personal knowledge of the facts set forth herein. I make this Declaration in support of Plaintiff's
4 Memorandum Of Law In Opposition To The Scio Individual Defendants' Motion To Dismiss.
5

6 2. Attached hereto as the exhibit indicated is a true and correct copy of the following:

7 Exhibit 1 – Hearing transcript from *In re Puda Coal, Inc. S'holders*
8 *Litig.*, C.A. No. 6476–CS (Del. Ch. Feb. 6, 2013).
9

10 I declare under penalty of perjury under the laws of the United States of America that the
11 foregoing facts are true and correct.

12 Executed on May 15, 2023

13 /s/ Martin A. Muckleroy
14 Martin A. Muckleroy
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Exhibit 1

Transcript from *In re Puda Coal, Inc. S'holders Litig.*, C.A. No. 6476–CS (Del. Ch. Feb. 6, 2013)

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE PUDA COAL, INC. :
STOCKHOLDERS LITIGATION :
: Consolidated
: C.A. No.6476-CS

- - -

Chancery Courtroom No. 12A
New Castle County Courthouse
Wilmington, Delaware
Wednesday, February 6, 2013
10:00 a.m.

BEFORE: HON. LEO E. STRINE, JR., Chancellor.

- - -

ORAL ARGUMENT AND THE COURT'S RULING

- - -

CHANCERY COURT REPORTERS
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

1 APPEARANCES:

2 NICHOLAS J. ROHRER, ESQ.
Young Conaway Stargatt & Taylor, LLP

3 -and-

4 GEORGE C. AGUILAR, ESQ.
of the California Bar
Robbins Umeda LLP

5 Liaison Counsel for Plaintiffs

6 S. MARK HURD, ESQ.

D. MCKINLEY MEASLEY, ESQ.

7 Morris, Nichols, Arsht & Tunnell LLP

-and-

8 RICHARD M. STRASSBERG, ESQ.

MARY K. DULKA, ESQ.

9 of the New York Bar

Goodwin Procter LLP

10 For Defendants Lawrence S. Wizel and
C. Mark Tang

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1 MR. ROHRER: Good morning, Your Honor.
2 Nicholas Rohrer. I wanted to introduce my co-counsel,
3 George Aguilar of the Robbins Umeda law firm who will
4 be making argument for plaintiffs. Thank you.

5 THE COURT: Good morning.

6 Good morning, Mr. Hurd.

7 MR. HURD: Good morning, Your Honor.
8 Mark Hurd of Morris Nichols for defendants Wizel and
9 Tang. I wanted to introduce to Your Honor Rich
10 Strassberg and Mary Dulka of Goodwin Procter.
11 Mr. Strassberg will be presenting argument on behalf
12 of our clients.

13 THE COURT: Let's be to the point this
14 morning. There are a few discrete issues, then we can
15 get to an answer.

16 Also, there's a motion for default
17 judgment; right?

18 MR. AGUILAR: Yes, Your Honor.

19 THE COURT: It's granted. What you
20 need to prepare is an order. I don't know what you
21 want in terms of relief. I think what you need to be
22 thinking about is -- given what I understand all the
23 parties before the case say is basically a theft of
24 corporate assets, I don't know what we can do in the

1 United States to get them back. But it would seem to
2 me a fairly strong judgment, which also allows you the
3 ability to get at any assets that the defendants have
4 placed in any channels of international commerce where
5 it's permissible to place liens against them or
6 transfer judgments to is in order.

7 MR. AGUILAR: Thank you.

8 THE COURT: Mr. Strassberg.

9 Mr. Strassberg, I'm going to be
10 really -- your demand excusal theory is one I'm trying
11 to understand. The three independent directors
12 resigned; right?

13 MR. STRASSBERG: Yes, they did, Your
14 Honor. They resigned. While the suit -- the suit
15 had --

16 THE COURT: The suit had already been
17 filed here.

18 MR. STRASSBERG: Yes, Your Honor.

19 THE COURT: They concluded the assets
20 had been stolen out from under them?

21 MR. STRASSBERG: Well, Your Honor, I
22 would say that the audit committee investigation that
23 they were compromising of did report back that it
24 appeared that Mr. Zhao had sold the assets.

1 THE COURT: What I mean is, sold the
2 assets. He didn't sell the assets and get
3 remuneration that was put in the corporate treasury.

4 MR. STRASSBERG: No. That's correct,
5 Your Honor.

6 THE COURT: That's what I mean by -- I
7 used the '70s-school-playground-kid kind of thing,
8 "stolen out from under."

9 Then the three independent directors,
10 because of lack of cooperation, resigned. Correct?

11 MR. STRASSBERG: They did resign, Your
12 Honor.

13 THE COURT: And they now stand before
14 the Court represented by excellent law firms saying
15 that demand is excused because, at the time this
16 complaint was filed, there were three independent
17 directors, and that would be a majority of the board
18 who could control what the company did. After those
19 three directors concluded that it appeared that the
20 assets of the company had been stolen out from under
21 them, they did not cause the company to sue to recover
22 the assets using their control of the board. They
23 quit, leaving the company in the hands of -- how many?
24 The two directors?

1 MR. STRASSBERG: The first director,
2 Mr. Zhu, had resigned first in September. So he had
3 left before any of the other independent directors had
4 resigned.

5 THE COURT: This was a five-member
6 board.

7 MR. STRASSBERG: Mr. Zhao would be the
8 remaining director.

9 THE COURT: I thought there were five
10 directors.

11 MR. STRASSBERG: There were two
12 implicated in the theft.

13 THE COURT: So it left the two.

14 MR. STRASSBERG: One of those two had
15 resigned earlier.

16 THE COURT: So it left the principal
17 suspected wrongdoer in control of the company. So as
18 I understand it, this is like you win because there's
19 cases that say you measure demand excusal by the board
20 in place when you filed the complaint. Your clients,
21 by quitting, immunized themselves from suit while
22 simultaneously making it impossible for the company
23 itself to bring the suit. I'm just wondering how, if
24 my state embraces this, we are not subject to totally

1 legitimate ridicule.

2 MR. STRASSBERG: Your Honor, so let me
3 address that point directly. I think your comments,
4 which go to the heart of the underlying activity by
5 Chairman Zhao reflect what appears to be a horrible
6 activity from him.

7 THE COURT: No. They go directly to
8 the argument that you and Mr. Hurd have made to me,
9 which is a demand excusal argument. Mr. Strassberg, I
10 did not ask you and Mr. Hurd to make this argument.
11 You made it. You did not bring just a 12(b)(6)
12 motion, you brought a demand excusal dismissal motion
13 seeking to impose upon the plaintiffs a higher burden
14 of pleading particularized facts on the grounds that
15 your clients -- and you don't represent the
16 independent director from China?

17 MR. STRASSBERG: No.

18 THE COURT: And the default judgment
19 motion has been against him, too?

20 MR. AGUILAR: Yes, Your Honor.

21 THE COURT: Well, I'm entering one.
22 You don't get to serve as a Delaware company and then
23 say, teeheehee, I'm not coming to Delaware on the
24 grounds that the three of them were independent

1 directors. They're a board majority. They could act
2 to take care of the company.

3 Of course, the undisputed fact is,
4 after they concluded that it appeared that the assets
5 were stolen out from under them, they did not cause
6 the company to sue. They quit. Then they come to
7 court and seek to have the case dismissed.

8 By the way, they're seeking to act on
9 behalf of the defaulting defendants. Well, Mr. Hurd
10 looks quizzical. If I dismiss the case on demand
11 excusal grounds, I can't enter a default judgment
12 against a wrongdoer, can I?

13 MR. STRASSBERG: Your Honor --

14 THE COURT: Can I?

15 MR. STRASSBERG: I'm not sure the
16 answer to that question.

17 THE COURT: Wait a minute. Why are
18 you not sure?

19 MR. STRASSBERG: What --

20 THE COURT: A Delaware lawyer is
21 telling me, I think, if I dismiss the case on demand
22 excusal grounds, I dismissed it because control of the
23 lawsuit belongs to the company, therefore the decision
24 to sue the insiders who took the assets belongs to the

1 company. The company might conclude that it's
2 perfectly okay to take the assets, or there's a cost
3 benefit analysis of suing and it's just not worth it.
4 I can't take on to myself in that situation. I can't
5 enter a judgment at the instance of derivative
6 plaintiffs because control of a lawsuit belongs to the
7 board, which is now controlled by the guy who your
8 clients suspect stole the assets out from under them.

9 MR. STRASSBERG: Your Honor, the
10 reason for the demand -- we hear Your Honor and we
11 believe that the 12(b)(6) motion is a meritorious one.
12 But the reason for the demand, as Your Honor has
13 asked -- as Your Honor knows better than anyone, the
14 reason for the demand requirement is to put these
15 decisions to the corporation at the time in May when
16 the case is filed.

17 THE COURT: I understand what it is.
18 And there's also the idea: yes, at the time that you
19 do it, you should ask the corporation to act. If at
20 the time motion practice occurs the people who are
21 claiming that they could act have concluded that the
22 entire corporate asset base has been sold out from
23 under the independent directors and what they decided
24 to do was to quit, for you, then, to say to the Court

1 that they could impartially consider a demand they
2 would have prior in time -- again, the law is supposed
3 to make common sense. There's a measuring stick of,
4 yes, if they stayed in office and stuck to their guns,
5 then the measuring stick is when they sued because
6 they were the ones you should have gone and made the
7 demand to. When, as a matter of undisputed reality,
8 when they were faced with knowing in their view that
9 there had been the most extreme sort of fiduciary
10 violation you could imagine, rather than have the
11 company sue, they quit, then come into court and seek
12 to use 23.1 and, frankly, disable the derivative
13 plaintiffs from even going after the bad guys. When I
14 mean bad guys, I'm using your client's own view of
15 these people. I'm trying to understand how my
16 state -- if I were to embrace this -- my state's
17 corporate law would not be justly subject to ridicule.

18 MR. STRASSBERG: Judge, again, I don't
19 want to belabor. I hear Your Honor and I respect Your
20 Honor's obviously views about this issue and I think
21 the motion and the plaintiffs' complaint is not
22 sufficient to sustain even the plaintiff friendly
23 standard under 12(b)(6). But if Your Honor -- so I'm
24 happy -- if Your Honor would like me to --

1 THE COURT: Do your clients speak
2 Chinese?

3 MR. STRASSBERG: One of the two
4 clients does speak Chinese.

5 THE COURT: One of them does.

6 MR. STRASSBERG: But one of them does
7 not.

8 THE COURT: These assets were sold out
9 from under him almost two years before they had any
10 inkling?

11 MR. STRASSBERG: Eighteen months, Your
12 Honor, yes. Your Honor, let me then turn, if I
13 might --

14 THE COURT: I actually don't.

15 MR. STRASSBERG: If you want me to
16 stay on it --

17 THE COURT: Actually, I'm pretty hep.
18 I have a question for your friend about one of their
19 counts, otherwise I'm fine.

20 MR. STRASSBERG: Okay.

21 THE COURT: Thank you, Mr. Strassberg.
22 Mr. Aguilar, what is this unjust
23 enrichment count about?

24 MR. AGUILAR: It's about the

1 compensation received by the individual defendants.

2 THE COURT: I understand that theory,
3 having decided the Scrushy case. As an innovator in
4 this field, I guess I would say the Scrushy case was
5 fairly unique in the sense -- what the Scrushy case
6 went to was the following. There was a situation
7 where, as I recall, there was difficulty getting
8 testimony, or whatever, from Mr. Scrushy because he
9 was in hot water with the CR part of the law rather
10 than the part that starts with CI. Some innovative
11 plaintiffs from -- one of the funny things is, you
12 know, some journals wrote about the law firm, the
13 obscure law firm that won Southern Peru. And they
14 mention some Pennsylvania law firm when it was really
15 the Prickett firm. Well, this was the Prickett firm
16 who won Scrushy, like they won Van Gorkom. What they
17 came up with was the theory of unjust enrichment and
18 the argument was pretty simple. There was a loan, or
19 something like that, where he had it and he paid it
20 back using equity at a time when the financial
21 statements of the companies were materially overstated
22 and had to be restated. So the theory was, without
23 any kind of fault -- right? --irrespective of whether
24 he's at fault, it was unjust enrichment, because what

1 he was allowed to pay back with was worthless, if you
2 get my drift. What I'm asking about here is, unjust
3 enrichment in this context, you plead nothing about
4 whether these guys got equity grants or option grants
5 or anything that was based on the financial
6 statements. It all seems to be they were stingy, bad
7 directors, who didn't put in any effort, therefore
8 they shouldn't get paid. To my mind, if it's the
9 latter theory, if that's really what you're about,
10 that's not a distinct cause of action. That is, the
11 remedy for a breach of fiduciary duty should include
12 that. And I saw nothing about whether there was, you
13 know, any tie to the amount of compensation they got
14 to the misstated financial statements.

15 MR. AGUILAR: You're correct, Your
16 Honor. It is our latter theory or how you expressed
17 it is our theory. We do not have any evidence of
18 compensation tied to the value of the asset that was
19 taken.

20 THE COURT: Okay. Thank you.

21 I'm actually -- unless you have
22 something to comment on that part, Mr. Strassberg, I'm
23 good.

24 MR. STRASSBERG: I don't, Your Honor.

1 THE COURT: Okay. I'm going to deny
2 the motion to dismiss, except in one minor respect.
3 I'll start with 23.1. I did find this an astonishing
4 argument from these gentlemen, because it actually
5 could have fairly catastrophic consequences on the
6 ability of the derivative plaintiffs to go after
7 persons that they claim to be essentially thieves.
8 I'm kind of an old-school Delaware guy. If there's a
9 demand excusal motion to dismiss that's granted, then
10 control of the entire lawsuit belongs to the board of
11 directors of the company, not to the derivative
12 plaintiffs. It doesn't just dismiss the suit as to
13 the independent directors. And that means I couldn't
14 have entered the default judgment that I entered
15 because the decision whether to bring an action
16 against those suspected wrongdoers would be in the
17 control of the board of directors, the sole member of
18 which is now the one who's alleged by the independent
19 directors to be the principal wrongdoer.

20 Why use the term ridicule? I think
21 those of us who actually -- judges in Delaware who
22 participate in corporate law in Delaware take
23 legitimate umbrage when folks say that we don't hold
24 managers accountable for breaches of fiduciary duty in

1 Delaware. I find that claim to be astonishingly
2 outdated and simple-minded, when any review of our
3 corporate law will see -- just out of our statutory
4 corporate law will say that is, frankly, much more pro
5 stockholder and more balanced than any of our other
6 states, most of which have stronger insulations
7 against director liability, many of which allow
8 directors in the context of takeovers to use takeover
9 defenses not permissible in Delaware, and when the
10 major controversies that have come out of Delaware
11 over the last 30 years, some of them have been about
12 things that are anti stockholder. Many of them are
13 cases like Van Gorkom, Omnicare, Quickturn. Guys like
14 me, El Paso, Southern Peru, Loral, where we've held
15 people accountable in big ways for things. And we
16 take seriously in the derivative suit contest that,
17 frankly, you shouldn't lightly take away from the
18 board of directors the ability to control a lawsuit.
19 But to use doctrinal law in some sort of gotcha way is
20 just not appropriate.

21 The plain, simple reality here, as
22 admitted by the moving defendants, is the following.
23 When these plaintiffs sued, they were a majority of
24 the board. So they claim they're independent with

1 their colleague from China. They could have
2 controlled the lawsuit. They investigate the very
3 things that are at the very bottom of the plaintiffs'
4 suit. They conclude that what the plaintiffs are
5 complaining about they subjectively believe is true.
6 But they have been stonewalled. In the face of
7 stonewalling and knowing that they could actually
8 cause the company to join the lawsuit and pursue
9 things, these directors quit. They quit. They leave
10 the company under the sole dominion of a person they
11 believe has pervasively breached his fiduciary duty of
12 loyalty.

13 Then, when faced with this lawsuit,
14 rather than simply defend it as to themselves on the
15 straight up 12(b)(6) ground, they use the shield of
16 23.1 and claim that because when they were in a board
17 majority at the time the lawsuit was done, the
18 plaintiffs can't go forward, even while telling the
19 Court that what they would do when they concluded
20 there was wrongdoing was not to bring suit but to quit
21 and leave the company in the control of a person that
22 they believed had seriously breached his fiduciary
23 duty of loyalty.

24 Now, I have read Kafka because I like

1 literature. I think it would be drawing the wrong
2 lessons from Kafka for me to premise a dismissal of
3 this case on demand excusal grounds. I think
4 Kafkaesque is the only way one could put that. It
5 would be ridiculous and it would be wrong. And I will
6 not -- do not believe our law requires such a
7 ridiculous result, and I am rejecting the demand
8 excusal argument.

9 On 12(b)(6), I am sorry. Even if it's
10 just purely looked at as a Caremark case, drawing
11 reasonable, rational inferences in favor of the
12 plaintiffs, as I must, I believe the inference -- one
13 possible inference you can draw from this complaint is
14 that essentially somebody took hold of an American
15 vehicle, filled it with assets, sold a large amount of
16 stock to the American investing public that
17 independent directors were willing to go on and be a
18 vehicle and get payments without understanding the
19 duties they were taking on. That if you're going to
20 have a company domiciled for purposes of its relations
21 with its investors in Delaware and the assets and
22 operations of that company are situated in China that,
23 in order for you to meet your obligation of good
24 faith, you better have your physical body in China an

1 awful lot. You better have in place a system of
2 controls to make sure that you know that you actually
3 own the assets. You better have the language skills
4 to navigate the environment in which the company is
5 operating. You better have retained accountants and
6 lawyers who are fit to the task of maintaining a
7 system of controls over a public company. When a
8 board of directors -- one of the things Caremark
9 people lose sight of, one of the things at the root of
10 Caremark, if you look at all the cases in the pattern,
11 there's also something that is a violation of law that
12 the company has been called out about. Important.
13 Companies -- we should all try to be as law compliant
14 as we can. I won't ask anybody about how compliant
15 they are with speed limits all the time. Often you
16 can be at a company where it has a \$25 billion market
17 cap and it's assessed a \$45 million regulatory penalty
18 for one of its pharmaceutical units in the northwest
19 of the United States. Right? Directors are sitting
20 on top of a board of a \$25 billion company. That
21 proportionality comes into play in assessing Caremark
22 and the reasonableness of peoples' efforts at
23 compliance because you can't watch everybody
24 everywhere. You have to have a system. This is a

1 little bit distinct from your typical Caremark case.
2 Why? Because the entire asset base of the company was
3 sold out from under the independent directors nearly
4 two years before they discovered it. And did they
5 discover it? No. Apparently people who can blog
6 about things discovered it.

7 Now, it may go that these directors
8 toured the organizations every quarter and were
9 actually having quarterly board meetings in facilities
10 the companies no longer owned. It might be that they
11 had their auditors in there. They had change of
12 control. It may be -- it may also be that they
13 basically met telephonically quarterly. Never went to
14 China. And I'm not going to dismiss it for anything.
15 There's a breach of fiduciary duty count. I believe
16 that the magnitude of what happened here, the length
17 of time it went undiscovered, the repetitive filing of
18 statements saying that the company owned assets they
19 didn't, I do think it gives rise to a Caremark claim
20 in these circumstances, and it gives rise again to the
21 possibility that people allow themselves to be -- I
22 just taught last night in class the Francis case from
23 New Jersey, the old bank case about the insurance
24 brokerage case, the woman who was on the board and she

1 never read any financial statements for ten years.
2 Whatever. And the Court said, "We didn't allow dummy
3 directors." What they mean by that, we actually do
4 allow dummy directors. You can be a dummy director.
5 You just have to be an active dummy director.

6 You're actually dumb; right? Strine
7 misses stuff. If I'm trying and I miss stuff, you get
8 credit for that. What you can't be is a dummy
9 director in the sense of an actual dummy. Like
10 somebody, a mannequin, somebody who allows themselves
11 to be appointed to something without any serious
12 effort to fulfill the duties.

13 Now we're at the motion to dismiss
14 stage. That is the most plaintiff-friendly,
15 least-defendant-friendly context of the case. But in
16 this situation, frankly -- and this is a troubling
17 thing for Delaware, and this court has taken very
18 seriously this -- the use of Delaware entities. And I
19 forget whether this was a shell. I suspect it was a
20 shell. I suspect it was something that never went
21 public in this form in the United States. It was
22 revived. I take very seriously our integrity. This
23 is a very troubling case in terms of that, the use of
24 a Delaware entity in something along these lines.

1 Independent directors who step into these situations
2 involving essentially the fiduciary oversight of
3 assets in other parts of the world have a duty not to
4 be dummy directors. I'm not mixing up care in the
5 sense of negligence with loyalty here, in the sense of
6 your duty of loyalty. I'm talking about the loyalty
7 issue of understanding that if the assets are in
8 Russia, if they're in Nigeria, if they're in the
9 Middle East, if they're in China, that you're not
10 going to be able to sit in your home in the U.S. and
11 do a conference call four times a year and discharge
12 your duty of loyalty. That won't cut it. That there
13 will be special challenges that deal with linguistic,
14 cultural and others in terms of the effort that you
15 have to put in to discharge your duty of loyalty.
16 There's no such thing as being a dummy director in
17 Delaware, a shill, someone who just puts themselves up
18 and represents to the investing public that they're a
19 monitor. Because the only reason to have independent
20 directors -- remember, you don't pick them for their
21 industry expertise. You pick them because of their
22 independence and their ability to monitor the people
23 who are managing the company. And a lot of life -- I
24 would not serve on -- if I were in the private

1 sector -- not that anybody would want me -- but there
2 are a lot of companies on boards I would not serve
3 because the industry's too complex. So if I can't
4 understand how the company makes money, that's a
5 danger. If it's a situation where, frankly, all the
6 flow of information is in the language that I don't
7 understand, in a culture where there's, frankly, not
8 legal strictures or structures or ethical mores yet
9 that may be advanced to the level where I'm
10 comfortable? It would be very difficult if I didn't
11 know the language, the tools. You better be careful
12 there. You have a duty to think. You can't just go
13 on this and act like this was an S&L regulated by the
14 federal government in Iowa and you live in Iowa.

15 So on Caremark alone, I have no
16 problem saying that it passes muster under 12(b)(6).
17 Again, 12(b)(6) is different than 23.1. One of the
18 things these directors tried to do was to impose a
19 particularized pleading burden. It's not a
20 particularized pleading burden. It's 12(b)(6). It's
21 perfectly conceivable on these pled facts that there
22 wasn't a good faith effort to try to monitor.

23 There's also another thing that in my
24 view states a claim for breach of fiduciary duty,

1 which is the behavior of these directors once they
2 recognized what the insiders had done.

3 I'm not sure that the Monty Python
4 response -- and I refer to the scene involving the
5 words "run away." I don't believe that -- there are
6 some circumstances in which running away does not
7 immunize you. It in fact involves a breach of duty.
8 And I think the extreme circumstances here might well
9 constitute one. If these directors are going to
10 eventually testify that at the time that they quit
11 they believed that the chief executive officer of the
12 company had stolen the assets out from under the
13 company, and they did not cause the company to sue or
14 do anything, but they simply quit, I'm not sure that
15 that's a decision that itself is not a breach of
16 fiduciary duty. And that's another reason for
17 sustaining the complaint.

18 So the motion to dismiss the breach of
19 fiduciary duty counts is denied.

20 I am going to dismiss the unjust
21 enrichment count for the following reasons that's pre
22 staged by my colloquy of both Mr. Aguilar.

23 Having been the Judge who kind of
24 innovated a bit with the use of unjust enrichment in

1 the Scrushy case, I think that is a fairly narrow use.
2 Unjust enrichment is an equitable gap filler that
3 exists when there isn't another legal or equitable
4 cause of action. The appropriate way to recover a
5 compensation paid to these directors, if it's on the
6 theory that they essentially didn't show up to work is
7 as an element -- that should be really part of the
8 damages that are assessed against them if the
9 plaintiffs prevail on their breach of fiduciary duty.
10 It's another thing if, as my colloquy with Mr. Aguilar
11 indicated, I think it would be another thing if they
12 got compensation that was measured by the false
13 financial statements. That, I think, would be more
14 analogous to Scrushy, where you wouldn't necessarily
15 have to prove fault on their behalf. They were simply
16 unjustly enriched, being the people who were --
17 approved the financial statements that were false and
18 were the basis for their excess compensation. I think
19 you could get to something, and I wouldn't probably
20 dismiss. You didn't engage on that point and I
21 applaud Mr. Aguilar's candor that that was not his
22 theory. So I'm going to dismiss that count without
23 prejudice. If there turns out to be some element of
24 compensation that is more tied to the statements, but

1 the present theory I don't expect to see again.

2 So why don't you all work on an
3 implementing order and we'll go from there. That
4 includes obviously, as to the default judgment,
5 figuring out where to go.

6 I also encourage, in light of the
7 entry of the default judgment, in light of the
8 colloquy this morning, perhaps there should be some
9 discussions between the plaintiffs and the defendants.
10 And there might be more commonality of interests than
11 perhaps has been suspected. I don't know. It may be
12 just a little bit of an adjustment of the perspective,
13 of widening the lens of these fellows and a little bit
14 of counsel yourselves about what this dynamic
15 involves. Because I think even your friends on the
16 plaintiffs' side would say your clients are
17 differently situated than the other defendants. But
18 sometimes in acknowledgment -- it's like when people
19 talk about doctors and patients where something goes
20 wrong; right? How far it goes with the patients
21 sometimes for the doctor to acknowledgment, but the
22 problem in the legal context is it's hard for people
23 to say they're sorry. Where somebody says I'm sorry,
24 which means I'm sorry that the operation didn't turn

1 out as well, it doesn't mean I'm sorry, in the sense
2 I'm admitting that I committed professional
3 malpractice and therefore I owe you all my net worth.
4 Those conversations don't happen because when you're
5 in a legal context. But the reality is that these
6 fellows were directors and the company was sold out
7 from under them. It can't feel good. In some way
8 that I'm not tied to any legal standard, they have got
9 to feel some sense of responsibility, probably, and it
10 might be working together to try to actually clamp
11 down in as big a way as possible on the wrongdoer,
12 together can be a mutually beneficial thing on a
13 kind -- all kinds of levels. But that's really up to
14 you all.

15 For now, I'm just doing the things I
16 said. So prepare an implementing order. Think hard
17 about what should be in the default judgment. I would
18 urge you all -- and, you know, I'd urge the plaintiffs
19 to not rush that one in. The only thing -- what I
20 mean by that is, it's a fairly serious document in
21 terms of how it's going to be used, what you can do
22 with it. The difficulties of collection or
23 enforcement I don't underestimate. You know,
24 experience does tend to indicate that folks who end up

1 with tens of millions of dollars often place them in
2 more than one nation, and that sometimes they're
3 wiring money, doing other things, and you're able to
4 capture that in places other than their home country.

5 I also, you know -- frankly, have no
6 understanding of whether there's the potential to get
7 something in China against them or not, but that
8 should obviously be explored. And to the extent that
9 China wishes to facilitate in-bound investment, this
10 is exactly the thing I wouldn't be putting on a
11 marketing brochure. There perhaps might be more
12 receptivity than folks might originally imagine to
13 being able to enforce a judgment in China. I don't
14 know. But what I'm saying is, it strikes me that, if
15 the principal purpose of this is to get recourse, it's
16 best to take a good patch of time seriously looking at
17 how the order should read and what you need from the
18 Court, and we can have a further hearing about that
19 when you're satisfied.

20 So, thank you. See you soon.

21 (Court adjourned at 10:41 a.m.)

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CERTIFICATE

I, DIANE G. MCGRELLIS, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 27 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 7th day of February, 2013.

/s/ Diane G. McGrellis

Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 108-PS
Expiration: Permanent